Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[These are the same Questions as presented in Petitioner's originally-filed Petition. Those involved in this Supplement are in italics]

1. At either a new hearing or new trial concerning punitive damages on remand, is additional relevant evidence regarding the net worth of a defendant admissible, particularly if there has been a change in defendants' financial condition since the original damage award?

2. *Did the punitive damages figure entered at the remand hearing comply with due process requirements and other punitive damages standards, particularly in view the alleged conduct supposedly supporting such damages?*

3. *Was the punitive damages award so excessive as to violate due process?*

PARTIES TO THE PROCEEDING

The parties to the proceeding, including those noted in the caption of this case, are:

Jacob Fraidin, Petitioner,

North American Credit Corporation (a party to the previous matters but not a Petitioner here),

Pacific Mortgage and Investment Corporation (a party to the previous matters but not a Petitioner here),

Andre Weitzman, Respondent, and

Sheldon Braiterman, Respondent.

TABLE OF CONTENTS

Opinions Below 1

Other Opinions Below 2

Grounds for Jurisdiction 4

Constitutional Provisions or Statutes Involved 4

Statement of the Case 5
A. Statement of Material Facts 5
(Summary--See Original Petition)
1. Previous Action on Loan 5
2. Settlement with Plaintiffs 5
3. Challenge to Settlement 7
4. Underlying Action 8
5. Appeal, Remand on Punitive Damages 9
6. Punitive Damages Remand Proceeding . . . 10
B. Opinion of Court
of Special Appeals of Maryland 11
(Summary--See Original Petition)

Supplemental Reasons for Granting Writ 13
I. As Now Established in Maryland Law, Petitioner's Conduct Did Not Give Rise To Liability For Tortious Interference With Contract, And, If So, This Conduct Does Not Constitute Malice Sufficient For an Award of Punitive Damages On Any Cause of Action In Respondents' Complaint 13

II. Punitive Damages Were Excessive in That Petitioner's Conduct Did not Give Rise to Liability 22

Conclusion 24

TABLE OF CONTENTS OF APPENDIX TO SUPPLEMENT TO PETITION

OPINION OF COURT OF APPEALS 1a
Alexander & Alexander Inc. v.
D. Dixon Evander & Associates, Inc.
336 Md. 635, 650 A.2d 260 (1994)
September Term, 1993
No. 53
December 8, 1994

TABLE OF AUTHORITIES

Alexander & Alexander Inc. v.
D. Dixon Evander & Associates, Inc.
336 Md. 635, 650 A.2d 260 (1994) . . . . . passim

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PETITIONER'S SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Jacob Fraidin, proceeding pro se, here submits this Supplement to his Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, ***to alert this Court to a decision by the Court of Appeals of Maryland issued after this Petition was filed and bearing directly upon the issues here.***

OPINION BELOW

This Supplement to the Petition for Writ of Certiorari is based on a crucial and very recent decision bearing upon the questions discussed in this Petition, and issued by the Court of Appeals on December 8, 1994. The Decision was issued after the decisions in the Court of Special Appeals in the present case and after this Petition was on file with this Court.

The case is *Alexander & Alexander Inc. (and Mary D. Scheeler) v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (December 8, 1994). The opinion is set forth in full in the Appendix to this Supplement, beginning at page 1a.

OTHER OPINIONS BELOW

[See previously-filed Petition and Appendix]

The case which is the subject of the original Petition was decided by the Court of Special Appeals on March 29, 1994 (*Jacob Fraidin, et al. v. Andre Weitzman, et al.*, No. 935, September Term, 1993). (The opinion is set forth in full in the Appendix to the previously-filed Petition, beginning at p. 1a). The case involved an appeal from a remand as to punitive damages, following an earlier appeal after jury verdicts against Petitioner in an action alleging tortious interference with contract.

The remand hearing on punitive damages was held in the Circuit Court for Baltimore City on February 25, 1993. At the conclusion of that hearing, the Circuit Court determined that the punitive damages would be reduced by half.

The matter arose from a jury trial in the Circuit Court for Baltimore City on a Complaint by Respondents Andre Weitzman, Esq. and Sheldon Braiterman, Esq. (as Plaintiffs) against Petitioners Jacob Fraidin (Fraidin) and North American Credit Corporation, Pacific Mortgage & Investment Company (the Corporations) (as Defendants) and other Defendants not parties to this Petition. The action involved efforts by Mr. Fraidin, on behalf of himself and the Corporations, to settle a jury verdict against him and those corporations on a claim brought by a husband and wife (through the two attorneys) over alleged irregularities in a mortgage loan. *The attorneys' action alleged tortious interference with contract* and other claims.

The Complaint by Respondent attorneys was filed February 13, 1986. (The first trial ended in a mistrial). Trial began on September 18, 1990. Petitioners, on December 20, 1990, were assessed compensatory damages of $183,474.93. The jury found punitive damages could be assessed. In a later punitive damages proceeding, the jury on January 18, 1991 assessed

punitive damages against Petitioners of $3 million--$2.5 million for Mr. Weitzman and $500,000 for Mr. Braiterman.

On May 3, 1991, the Circuit Court denied post-judgment motions. Defendants appealed to the Court of Special Appeals of Maryland.

On August 9, 1991, while the appeal was pending, Mr. Fraidin filed for bankruptcy. The Court of Special Appeals, on August 19, 1991, stayed further proceedings. On September 26, 1991 relief from automatic stay was granted by the Bankruptcy Court. On October 15, 1991, the Court of Special Appeals ordered that the appeal and other matters shall proceed.

On September 4, 1992, the Court of Special Appeals issued its opinion in *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992). Numerous issues were reviewed which are not part of the Petition or this Supplement to the Petition. The Court of Special Appeals affirmed the verdict as to liability and as to compensatory damages. (See Appendix to original Petition.)

However, Court of Special Appeals remanded the punitive damages award. The Court determined due process requirements were not met in the award, which, as the Court remarked, equalled Mr. Fraidin's net worth even by the most generous view of the evidence at the time of trial.

The Court of Special Appeals' mandate in the earlier appeal was issued October 5, 1992. Petitioners submitted to the Court of Appeals of Maryland a petition for a writ of certiorari on other issues the matter. This was denied on January 14, 1993.

On remand as to punitive damages, the Circuit Court (Hon. Thomas E. Noel, J.) did not conduct a new trial. Instead, on February 25, 1993, it conducted a hearing at which it declined to consider certain new evidence--that is, the fact that Mr. Fraidin had in the interim filed for bankruptcy, which did not exist at the time of the jury's January 18, 1991 punitive damages award.

The Circuit Court decided the punitive damages award would be reduced by half. It issued an Order remitting any punitive damages in excess of $1,250,000 for Mr. Weitzman and any punitive damages in excess of $250,000 for Mr. Braiterman.

This prompted a second appeal by Mr. Fraidin (and the Corporations) to the Court of Special Appeals as to the remand proceeding. The Court of Special Appeals, on March 29, 1994, affirmed the Circuit Court. (*Jacob Fraidin, et al. v. Andre Weitzman, et al.* Court of Special Appeals, No. 935, September Term, 1993 (unreported)).

The Court of Special Appeals mandate was issued April 28, 1994. Petitioners applied to the Court of Appeals of Maryland for a writ of certiorari. That petition was denied by the Court of Appeals on September 14, 1994.

Subsequently, on December 8, 1994, the Court of Appeals decided *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (1994).

GROUNDS FOR JURISDICTION

The Court of Special Appeals issued its opinion on March 29, 1994. On September 14, 1994, the Court of Appeals denied Petitioner's timely submitted a petition for a writ of certiorari. This original Petition before this Court was filed within 90 days of the September 14, 1994 denial by the Court of Appeals of the petition to that Court for a writ of certiorari.

The jurisdiction is based on 28 U.S.C. Sec. 1257(a).

STATUTES OR PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Statement of the Case was reviewed in the previously-filed Petition and is recited in general here. For a more detailed treatment, see the Statement of the Case in the previously-filed Petition, beginning at p. 5.

A. Statement of Material Facts

1. Previous Action Challenging Loan

The scenario began with a $10,000 loan arranged between Ray Dorman and Margarette Dorman ("the Dormans") and North American Credit Corporation. The loan was brokered by Pacific Mortgage & Investment Group, Ltd. and secured by a mortgage held by North American Credit ("the Corporations"). Both Corporations are managed by Jacob Fraidin ("Fraidin").

After the loan was paid, the Dormans decided it, and the interest charged for it, were improper. In May of 1982, they retained Sheldon H. Braiterman, P.A. ("Braiterman") and Andre R. Weitzman ("Weitzman") to take legal action on their behalf against Fraidin and the Corporations concerning the loan. At that time, Weitzman was part of Braiterman's law firm, Braiterman & Johnson, P.A. The Dormans executed a power of attorney and contingent fee arrangement ("the Contract").

Mr. Weitzman started his own firm in April, 1985. A new contract, dated April 10, 1985, was arranged between Weitzman and the Dormans.

An action challenging the $10,000 loan was filed on behalf of the Dormans against Fraidin and the Corporations. On September 23, 1985, after a three-day trial, the jury returned a verdict against Fraidin and the Corporations of $66,949.86 in compensatory damages and $300,000 in punitive damages. Post-trial motions were denied on November 7, 1985.

2. Fraidin's Settlement with Dormans of Judgment

Following this verdict, Fraidin wished to settle the matter

and believed the Dormans wished to do so. Fraidin (without attorney Weinstock) met with Weitzman and Braiterman on November 1, 1985 and offered to settle the judgment for $100,000 over five years or $60,000 payable immediately. This offer was not accepted and was not communicated by Weitzman to the Dormans.

On November 12, 1985, Fraidin hired Gordon, Feinblatt, Rothman, Hoffberger & Hollander for post-judgment matters. Lawrence D. Coppel of that firm reviewed the case and met with Fraidin. Weinstock continued to be involved as counsel.

In mid-November, 1985, there were further contacts about settlement or other matters between either Fraidin or Weinstock and Braiterman or Weitzman. Eventually, there was direct contact concerning settlement between Fraidin and the Dormans. On November 25, 1985, Dorman left a message at Weinstock's office that he wanted to settle. Weinstock told Fraidin and Weitzman about this call. Fraidin requested advice and was informed by Weinstock and by Coppel that he could deal directly with the Dormans.

On November 27, 1985, Fraidin contacted the Dormans to meet about settlement. The Dormans told Weitzman of this meeting, although Weitzman advised Dorman not to meet with Fraidin if Weitzman was not present.

It appeared the Dormans, dissatisfied with the treatment they had received by Weitzman, had decided to discharge him as their counsel before any meeting between them and Fraidin--although this remains disputed by Respondents. In any event, the Dormans arranged to meet Fraidin directly.

On Thanksgiving Day, 1985, Fraidin met with the Dormans and discussed settlement. Weitzman was not present. On November 28, 1985, Fraidin met with Mr. Dorman and Weitzman. That meeting did not produce a settlement. Several

days afterwards, Fraidin met with the Dormans again. Weitzman, initially, was not present at first, but he did appear and attempted to break up the meeting.

On December 4, 1985, the Dorman sent notice discharging Weitzman and Braiterman. On December 6, 1985, Weitzman met with Mr. Dorman and obtained a handwritten statement disclaiming that letter and confirming the case had not been settled.

Nevertheless, settlement did occur between Fraidin and the Dormans directly. *On December 9, 1985, the Dormans settled with Fraidin for $50,000 cash.* On December 8, Fraidin informed Weitzman that Fraidin and the Dormans were going to settle the next day and told Weitzman that he, Weitzman, was welcome to attend. Attorneys for Mr. Fraidin or for the Dormans were not present at this settlement.

A notice of satisfaction of judgment was filed with the court, on December 10, 1985. The Dormans reaffirmed their December 4 written discharge of Weitzman and Braiterman.

3. Challenge by Dormans' Former Counsel to Settlement

Upon learning of the settlement, Weitzman and Braiterman, on December 11, 1985, filed a motion to set aside the order of satisfaction. On December 14, 1985, the Dormans wrote to Weitzman, reaffirming their termination of his services.

The Circuit Court (J. William Hinkel, J.) held a hearing on the motion to set aside the settlement on December 26, 1985 (J. William Hinkel, J.). The hearing was extensive. All counsel involved were present. Ms. Dorman testified the settlement was voluntary and that they were satisfied with it.

On January 10, 1986, Judge Hinkel denied the motion by the attorneys to set aside the order of satisfaction. There was no appeal. This should have ended the matter.

4. Underlying Action by Weitzman/Braiterman Against Fraidin, et al.

However, on February 13, 1986, Weitzman along with Braiterman and Johnson, P.A. initiated legal action in the Circuit Court for Baltimore City against: the Dormans, Fraidin, the Corporations (that is, Pacific and North American Credit), Weinstock and his firm, and Coppel and his firm. The multi-count Complaint alleged: breach of contract, quantum meruit fee, fraud, conspiracy, and tortious interference with contract. The Complaint sought compensatory and punitive damages.

Trial did not commence until January, 1990. That trial ended in a mistrial.

A second trial began on September 18, 1990 and would take up 29 days. The eventual result was in favor of the Plaintiff attorneys. The jury verdicts were:

on Count I (breach of contract against Dormans): $25,000 (one half of the settlement figure arrived at between Fraidin and the Dormans--$12,500 to each Plaintiff), plus interest;

on Count IV (interference with contract as to Fraidin, the Corporations, and their counsel): no liability as to counsel, but liability as to Fraidin and the Corporations and damages of $183,474.93 (one half of the award in the original suit--$91,737.47 for each Plaintiff), plus interest, and

on Count V (civil conspiracy as to all defendants): liability as to the Dormans, Fraidin and Corporations, but not as to their counsel. However, no damages were awarded.

Exemplary damages were assessed on Counts IV (interference with contract) and V (civil conspiracy). In the later punitive damages proceeding of January 18, 1991, the jury awarded punitive damages against Fraidin and the Corporations totalling $3,000,000--$2,500,000 for Weitzman, and $500,000 for Braiterman.

Post-judgment motions were denied on May 3, 1991. Fraidin and the Corporations then appealed to the Court of Special Appeals, raising various issues regarding the trial.

5. Appeal, Remand on Punitive Damages

The Court of Special Appeals opinion involved considerable discussion of several issues. The bulk of this discussion is not relevant to the Petition or to this Supplement and need not be recited here. See *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992) (Bishop, J.), *cert.den.*, 329 Md. 109, 617 A.2d 1055.

In general, the verdict was affirmed. The sole matter remanded to the Circuit Court was the punitive damages.

On that issue, *Fraidin disputed the conclusion that the evidence was sufficient to support a finding of malice by him against Weitzman and Braiterman.* Fraidin noted that, as to any continuing contract between the Dormans and Weitzman or Braiterman, there was evidence the Dormans already were dissatisfied with Weitzman and Braiterman before they ever met with Fraidin, and that they had discharged the attorneys before any contact or meeting with Fraidin.

Petitioners thus contended that, at the time of the settlement discussions between Fraidin and the Dormans, there was no attorney-client relationship from which any malice could be inferred by Fraidin against Respondent attorneys. Fraidin's interest was simply to see if the Dormans would settle. This situation clearly affects the matter of Fraidin's "malice."

The Court of Special Appeals determined (deciding the question before *Alexander*) that sufficient "malice" in the legal sense could be found based on these circumstances. But the Court remanded the punitive damages matter in light of due process standards described by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). (For a further

discussion in Maryland as to these standards, see *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137--a precursor to the *Alexander* decision which is the subject of this Supplement.

As to due process standards, the Court of Special Appeals found that any punitive damages award meeting due process requirements *must relate to the defendant's ability to pay*. It then proceeded to discuss that question (see discussion in previously-filed Petition).

The Court of Special Appeals remanded the punitive damages award to the Circuit Court "for its reconsideration of granting a remittitur, or if rejected, a new trial." The Court then discussed other various issues not involved in this present appeal (see 93 Md.App. 218-239).

6. Punitive Damages Proceeding on Remand

At the February 25, 1993 hearing on punitive damages, Fraidin maintained that, consistent with the remand directive, a new trial on punitive damages was appropriate. And any new trial or any other remand proceeding on the issue must consider any additional evidence concerning the defendant's financial status in order to determine any appropriate punitive damages award.

Weitzman and Braiterman contended no new evidence could be introduced because the proceedings were in the nature of a motion for remittitur. Petitioners submitted a request for remittitur along with other post-trial request for relief (new trial, etc.) after the jury verdict in the original trial. But no such motion was pending at the time of the February 25, 1993 proceeding.

At the February 25 remand proceeding, Fraidin reminded the Court that his bankruptcy was still active. He stated the Bankruptcy Examiner was in Court and was prepared to testify

as to Fraidin's financial condition, with documentation.

The Circuit Court stated it would not hear additional evidence and remarked, "I would be most interested in hearing what the investigator would testify to, but I don't feel it is proper." The Court added, "I do find that in a remittitur hearing I am bound by what occurred at trial, and I am not permitted to go beyond that, so that is what I will limit my finding to, the evidence that was adduced during the very lengthy and interesting trial that we had here... ."

The Court ruled (as for this and other matters occurring at the remand hearing, see references previously-filed Petition and Appendix, including transcript of the remand hearing in the Appendix to the Petition beginning at p. 51a). The Court's discussion in its ruling included the comment, "I differ from [Plaintiffs's suggestion] that the degree of malice should be considered as a factor in determining the amount in order to be remitted. * * *"

The Circuit Court then determined the punitive damages against the Petitioner/Defendants (Fraidin and Corporations) would be reduced by half. It assessed punitive damages at $1,500,000 on behalf of Plaintiff/Respondent Weitzman and $250,000 on behalf of Plaintiff/Respondent Braiterman. An Order to that effect was issued on February 25, 1993.

B. Decision by the Court of Special Appeals

On Petitioners' appeal from the remand proceeding on punitive damages, the Court of Special Appeals affirmed the Circuit Court. (*Fraidin v. Weitzman*, Court of Special Appeals, No. 935, March 29, 1994, September Term, 1993 (unreported) [See Appendix to previously-filed Petition at p. 1a].

The Court stated, "The jury's award of punitive damages was based upon evidence considered by the jury at trial." The Court then continued: "Thus, it would have been inappropriate

for the trial court to have granted its remittitur based upon evidence other than that considered by the jury. In short, the trial court complied with our mandate. There was no error."

The Court decided the award was not excessive. It stated: "[W]e shall not entertain Fraidin's argument that the award was excessive because it is not proportionate to his reprehensible conduct. We made it clear in *Fraidin I* that, although the award was quite high, it violated due process only because it consumed Fraidin's entire net worth."

As to the proceeding itself, the Court stated, "We have recognized that 'the granting or refusal of a remittitur is largely within the discretion of the trial judge.'" The Court said, "On remand, we expressly directed the trial court to reconsider Fraidin's motion for remittitur on this basis."

The Court thus found that the amount of the remittitur should be based on the same abuse of discretion standard. And the Court of Special Appeals found no abuse of discretion in the Circuit Court's treatment of the issues in the remand proceeding or in its remittitur. It thus affirmed the Circuit Court.

Petitioner and the Corporations applied to the Court of Appeals for a writ of certiorari. This petition was denied on September 14, 1994.

HOWEVER, the Court of Appeals, just weeks later, decided *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, No. 53, September Term, 1993, decided December 8, 1994.

SUPPLEMENTAL REASONS FOR GRANTING WRIT

The Supplemental Reasons concern Question No. 2 and Question No. 3 of the Questions Presented in the previously-filed Petition (repeated in this Supplement):

2. Did the punitive damages figure entered at the remand hearing in this matter comply with due process requirements, especially in view of the conduct supposedly supporting such damages?

3. Was the punitive damage award so excessive as to violate due process?

[For discussion of other issues in
Reasons for Granting Writ,
see original Petition, beginning at p. 18]

I. AS NOW ESTABLISHED IN MARYLAND LAW, PETITIONER'S CONDUCT DID NOT GIVE RISE TO LIABILITY FOR TORTIOUS INTERFERENCE WITH CONTRACT, AND, IF SO, THIS CONDUCT DOES NOT CONSTITUTE MALICE SUFFICIENT FOR A PUNITIVE DAMAGES AWARD ON ANY CAUSE OF ACTION IN RESPONDENTS' COMPLAINT.

Following the Court of Appeals decision issued after this Petition was filed, the punitive damages assessed against Petitioner at trial, reassessed at the remand proceeding following the original appeal, and then affirmed by the Court of Special Appeals in the appeal following the remand proceeding, cannot be sustained. To do so now would be a miscarriage of justice. This Court is in a unique position to review the punitive damages award and to grant appropriate relief.

The Court of Appeals' recent decision in *Alexander & Alexander v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (1994) ("Alexander"), drastically alters the situation regarding the liability supposedly attaching to Petitioner's actions and clearly affects the punitive damages discussion here. In *Alexander*, considering a situation much more egregious than the present instance, the Court of Appeals *did not find the requisite malice for recovery on a cause of action of tortious inference with contract or with business relationship, and thus did not find the requisite malice for recovery of punitive damages.*

Indeed, the Court of Appeals in *Alexander* did not even reach due process issues relating to punitive damages. (See fn. 25 at Supp.App. 31a--for a discussion of these issues as they relate to the present matter, see originally-filed Petition). Thus, the Court of Appeals overturned a punitive damage award *totalling $5,000,000.*

It is simply a matter of timing that the Court of Appeals issued its *Alexander* decision after denying certiorari in this present case. Had this decision been issued mere weeks earlier, the Court of Special Appeals would have had to consider it in its review of Petitioner's appeal from the remand proceeding. And even if the Court of Special Appeals' decision would have been the same, had *Alexander* already been issued by that point, the Court of Appeals would have found it necessary to grant certiorari in order to correct such a decision.

Crucial to Petitioners' argument throughout the discussion of punitive damages was whether Petitioner's conduct was sufficient to require a finding of liability and even if so, whether "malice" could be found based on this conduct sufficient for a punitive damage award. These issues were present not only at the

original trial of this matter but in the appeal from that trial, at the remand proceeding, and in the appeal from that remand proceeding--which resulted in the present Petition here.

Even if there was room for debate on those issues in the prior stages of this matter, *Alexander* has settled the issue in Petitioner's favor. Petitioner's conduct did not constitute the "malice" necessary for recovery and, even if so or even if recovery was available on another cause of action, the conduct involved was not accompanied by the "malice" necessary for an award of punitive damages in any event.

Alexander, reviewed a complex series of negotiations concerning a hospital system and its insurance broker. Medical malpractice insurance is an extensive industry and the insurance premiums can be large--commissions on those premiums can likewise be extremely significant to any insurance broker.

Plaintiff Evander had been the hospital system's broker for years. However, the hospital undertook a reconsideration of its insurance situation and chose a new broker. But it also arranged broker for a renewal of a certain aspect of its malpractice policy arranged by the prior broker. The hospital's contract with the new broker was for a flat fee for services, without commissions.

However, Evander had expected a commission on that aspect of the policy which the hospital had renewed (the commission was in excess of $250,000). There was later to be considerable dispute on whether that commission was due. Nevertheless, due to the negotiations between the hospital and the new insurance broker and the contract arranged between these parties, no commission was paid to Evander.

Evander sued for this commission and contended that the conduct between the hospital, the new broker, its subsidiary, and other individuals constituted civil conspiracy and tortious

interference. He thus presented those, among other, claims. There was dispute at trial as to various aspects of the alleged conduct and whether it constituted sufficient malice for recovery on the causes of action, or a basis for punitive damage award.

The verdict in the original trial was in favor of Evander. Compensatory damages were awarded. In addition, the jury awarded *punitive damage* awards of *$40,000,000* against the broker, *more than $250,000* against one of the individuals involved (Scheeler) and *$70,104.15* against other defendants. The trial court reduced the punitive damage award against the broker to $12,500,000. (See Supp.App. 10a).

On appeal, the Court of Special Appeals reversed and remanded on punitive damages issue, in light of due process standards and other considerations. See *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137 (the Court of Appeals at that time denied certiorari).

After an extensive 29-day jury trial on remand as to punitive damages, the jury awarded $4,000,000 in punitive damages against the new broker and $1,000,000 in punitive damages against one of the individuals involved (Scheeler). On appeal from this punitive damages verdict, the Court of Appeals immediately granted writs of certiorari filed by both sides, prior to any determination by the Court of Special Appeals.

The Court of Appeals then *reversed*. In a wide-ranging discussion on the nature of the causes of action for civil conspiracy and tortious interference with contract or with business relationship, the *Alexander* court found that there was an insufficient showing of "malice" to recover on the tortious interference cause of action *or* to award punitive damages.

The Court noted [Supp.App. 18a]:

> [T]his case does not involve an alleged wrongful interference with a specific, discrete contract between Evander and Shand but interference with an ongoing business relationship that included Evander's entitlement to a commission upon the hospital's exercise of the OEP option. This case thus implicates the broader form of the tort, namely malicious or wrongful interference with economic relationships.

The Court indicated, however, that even the more specific form of the tort (interference with contract) involves some showing that the alleged conduct was engaged in with malice.

The Court of Appeals stated the law permits "aggressive" efforts by "[p]articipants in the economic marketplace." Even "purposeful interference with business relationships" may be considered "an integral part of commercial competition" and thus not be considered wrongful with respect to such tort actions. (And see discussions at fns. 15-18).

Therefore, the Court added, *"we have made it clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious."* [Emphasis supplied]. And further, *"this Court has refused to adopt any theory of tortious interference with contract or with economic relations that 'converts a breach of contract into an intentional tort.'"* (Supp.App. at 21a). [Emphasis supplied].

The Court of Appeals observed that the law should carefully consider allowing the natural conduct of actors in the economic marketplace to serve as the basis for tort actions, particularly in view of the additional recovery available in tort actions of this nature, including punitive damages. Thus, the Court stated, the tort does not lie "whenever an intentional breach of contract would forseeably impinge upon a contracting party's economic relations with others." (Supp.App. at 23a). And the

Court stated [citation reference omitted, emphasis supplied] (Supp.App. at 24a):

> [T]ortious intent alone, defined as an intent 'to harm the plaintiff or to benefit the defendant at the expense of the plaintiff,' [is] not sufficient to turn deliberate interference into a tort, but that the defendant must interfere through improper or wrongful means.
>
> Therefore, wrongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships.
>
> * * *
>
> In addition, 'actual malice,' in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful *where the defendant's malice is the primary factor that motivates the interference.*

When it is evident that the interference claim does not involve any illegal acts, the plaintiff carrys "a heavy burden in trying to establish the interference tort through proof of actual malice." In addition, "*acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent.*" Thus, even proof of "animosity" is not sufficient to sustain the tort if the actor's conduct "was incidental to its pursuit of legitimate commercial goals." (Supp.App. 26a, emphasis supplied).

The Court of Appeals then determined, reviewing the scenario before it, that the various Defendants were acting within the context of legitimate commercial goals. And even assuming

that ill will or spite was involved, Plaintiff Evander "utterly failed to prove such ill will or spite."

Much of the Plaintiff's claim in that regard concerned an alleged statement made to another about Plaintiff by Defendant Scheeler, and the Court of Appeals found that the requisite level of proof regarding this statement was not present in the record. (See discussion at Supp.App. 28a-31a and fns. 22 and 24). The Court found evidence of this statement was properly excluded.

With this statement excluded, there was insufficient additional evidence of malice in the Defendants' conduct to sustain the tort or, for that matter, to award punitive damages. The punitive damages in the second trial were awarded because the trial court had instructed the jury that the conduct did involve malice. But the *Alexander* Court concluded this instruction was incorrect given its view of the issues. "Thus, at both trials, [plaintiff] Evander failed to offer sufficient admissible evidence of actual malice for this issue to have been submitted to either jury."

Therefore, the Court concluded (Supp.App. 31a):

> Evander failed to establish that the defendants' interference with economic relations was wrongful or malicious, and thus failed to prove the existence of tortious conduct. Moreover, even if we were to assume arguendo the existence of tortious conduct, Evander failed to establish the requisite actual malice to support an award of punitive damages.

The $5,000,000 total punitive damage awards were reversed. Judgments in favor of the Defendants were to be entered.

The Court of Appeals, in its review of the causes of action which were involved in this present matter and its sweeping re-evaluation of the level of malice required to sustain

such a cause of action, **essentially has obviated any finding of liability against Petitioner**, which was based in large part on Respondents' tortious interference claim. And the Court clearly has concluded that under the view of Maryland law on these issues, any punitive damage award against Petitioner in the present circumstances would be improper.

As Petitioner also attempted to emphasize in the punitive damages remand proceeding, the evidence showed that he simply was seeking to settle certain litigation. The evidence showed the Dormans were dissatisfied with Respondent Weitzman's representation of them and had discharged them as their counsel. Weitzman then sought on his own to reverse this action by the Dormans.

The evidence showed that Fraidin had consulted with counsel to ensure the propriety of any direct contact between him and the Dormans without any counsel that may still be representing the Dormans. He contacted Weitzman about these meetings. He never evidenced any malice toward Weitzman or toward Respondent Braiterman.

The entire settlement was approved by the Circuit Court in an open proceeding based on the motion of Weitzman and Braiterman to set aside the notice of satisfaction of judgment. The Circuit Court, based in part on testimony from Ms. Dorman that they Dormans had freely entered into the settlement, found that the settlement was voluntary and refused to set it aside. Obviously, no malice or improper conduct can be inferred from an arrangement which produces such a ruling by a Court based on the evidence surrounding those negotiations.

Further, even if the later action by Respondents against Petitioner--which is the source of all further litigation in this matter including the present Petition--was proper, Fraidin was simply acting in his own "commercial interest" in seeking

settlement of the litigation. And, as the Court of Appeals determined in *Alexander*, *even if there was any improper motive* in Petitioner's conduct, this is *not* sufficient to sustain the tort action--or to demonstrate malice permitting a punitive damage award--if the conduct involves legitimate commercial or business goals. Even "aggressive" conduct in this regard will not be punished by the law.

There was no evidence that Fraidin acted with the requisite malice to sustain this cause of action. Under the standards restated and emphasized by *Alexander* and considering conduct in that case in which an insurance broker was essentially deprived of more than $200,000 in commissions, the Court of Appeals found *no "malice" sufficient to permit recovery on the causes of action.*

Beyond this, there was no "malice" sufficient to permit recovery of the punitive damages. Thus, punitive damages in *Alexander* which originally were more than $40,000,000 against one Defendant, reduced by the trial court to $12,500,000, and then which became $4,000,000 in the remand punitive damages proceeding following the initial appeal--became zero.

Under this discussion, the conduct in the present matter cannot possibly reach even the level of liability. No evidence could be adduced then or now to attach the level of malice which now must be shown to permit recovery on tortious inference matters. And even if there could be recovery on civil conspiracy, there must still be "malice" for recovery of punitive damages. As *Alexander* now has shown, in these types of scenarios, such malice requires a strong showing that does not exist here.

Therefore, *in view of this very recent declaration by the Court of Appeals on issues and standards dealing with the Questions Presented in this Petition*, Petitioner urges this Court to grant the Petition to review the Court of Special Appeals

actions here. Upon that review, and given the standards as now operate in the Maryland law on these issues, Petitioner contends that the Court of Special Appeals' decision affirming the Circuit Court's actions in the punitive damages remand proceeding must be reversed.

II. THE PUNITIVE DAMAGE AWARD WAS EXCESSIVE IN VIEW OF THE FACT THAT PETITIONER'S CONDUCT DID NOT GIVE RISE TO LIABILITY

And, as Petitioner stated in his original Petition, the $1.5 million punitive damages award violated due process standards. Several factors are involved for compliance with the concepts of due process in a particular punitive damage award, such as:

--the relationship between such damages and the harm likely to result as well as the harm which occurred,

--*the degree of reprehensibility of the conduct*,

--the existence or frequency of similar past conduct,

--the profitability to the defendant of the conduct, and

--the defendant's financial position,

No less important considerations are that punitive damages are an "extraordinary sanction" to be awarded in egregious cases. They may be imposed only where there is "outrageous conduct." Their purpose is not to reward the plaintiff.

Here, the supposed "reprehensible" conduct was attempts by Fraidin to settle a lawsuit without participation of attorneys for the plaintiffs, in which there was a genuine dispute over whether the attorneys already had been discharged by the plaintiffs. The evidence at trial showed that the Dormans, more than once, reaffirmed their discharge of Weitzman and Braiterman. In the hearing to set aside the settlement, Ms. Dorman testified they were not coerced into it by Fraidin. The settlement was confirmed by that court. The supposed

"outrageous" and "egregious" conduct, or its "degree of reprehensibility" must be viewed in this context.

There was no evidence of any past conduct by Fraidin of this sort or of the likelihood of any future such conduct. The "profitability" to Mr. Fraidin of the conduct was before the jury. Further, this act did not result in severe personal injury, death, harm to reputation, or permanent environmental pollution.

Neither the Circuit Court nor the Court of Special Appeals in reviewing this case had the recent decision of *Alexander* to guide its determination of the issues. But as is clearly the case now, the standards as expressed in *Alexander* would result in a finding of no recovery on the basic causes of action, and even if liability were found as to any cause of action not requiring a showing of "malice," would result in a finding of no award of punitive damages.

As Petitioner has stated, the Circuit Court's review of the punitive damages award on remand did not properly consider these factors. The Court did not even review whether there was sufficient evidence to support the punitive damages award. Such an award was a manifest injustice, which the Circuit Court had a duty to prevent, even after affirmance of the underlying verdict on appeal.

Refusal by the Circuit Court to order a retrial of punitive damages, to admit additional evidence, to examine the background, or to support its decision as to a $1.5 million award, was error or abuse of discretion. The Court of Special Appeals erred in affirming not only the manner in which the remand proceedings were conducted but also the punitive damages award itself.

The issues which prompted the remand, and the treatment of those issues in the remand proceeding, should command the attention of this Court.

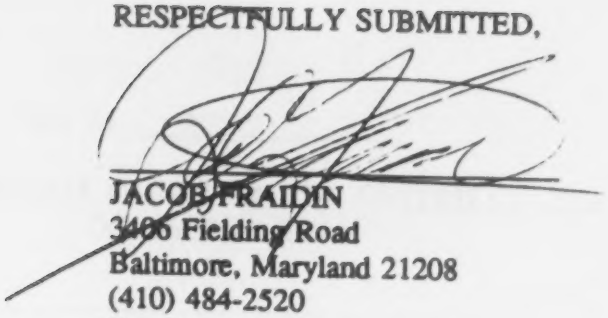
Standards as to malice and punitive damages in cases involving tortious interference with contract or with business relationship, as now declared by *Alexander*, directly affect the issues here. Petitioner urges this Court to consider this Supplement to his Petition.

Given the view of these issues as expressed by *Alexander*, approval of the punitive damages award here would be a miscarriage of justice.

CONCLUSION

THEREFORE, Petitioner request of this Court that it GRANT his Petition for a Writ of Certiorari and REVERSE the decision of the Court of Special Appeals of Maryland.

RESPECTFULLY SUBMITTED,



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Pro Se

No. 94-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX TO
PETITIONER'S SUPPLEMENT TO
PETITION FOR A WRIT OF CERTIORARI

IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 1993

ALEXANDER & ALEXANDER INC. and
MARY D. SCHEELER

v.

B. DIXON EVANDER & ASSOCIATES, INC.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Bell
Raker
*Orth, Charles E., Jr.
(Retired, specially assigned),

JJ.

Opinion by Eldridge, J.

Filed: December 8. 1994

* Orth, J., retired, and specially assigned, participated in the hearing and conference, but died prior to the filing of the opinion.

This case involves a challenge to awards of punitive damages against Alexander & Alexander, an insurance broker, and against Mary Scheeler, one of its vice presidents. A jury awarded the punitive damages under a count alleging tortious interference with a contractual arrangement concerning insurance commissions. The jury determined that the plaintiff, B. Dixon Evander & Associates, Inc., was entitled to $4,000,000.00 in punitive damages from Alexander & Alexander and $1,000,000.00 in punitive damages from Mary Scheeler. The issue before us is whether there was any basis for the awards of punitive damages.

I.

B. Dixon Evander is the founder, owner and principal officer of B. Dixon Evander & Associates, Inc., an insurance brokerage corporation.[1] The corporation specializes in procuring medical malpractice liability insurance for health care providers. In 1962, Evander was invited to submit a proposal for medical malpractice insurance for the University of Maryland Hospital and its staff. Evander obtained from the hospital the right to procure such insurance, and, between 1962 and 1985, Evander developed and managed a professional liability program for the hospital and its medical staff.[2]

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1 Hereinafter, B. Dixon Evander & Associates,, Inc., will simply be referred to as "Evander." The individual B. Dixon Evander will be referred to as "Mr. Evander."

2 The insurance relevant to this case consists of two professional liability insurance policies and their renewals. The policies include as named insureds the hospital and medical professionals employed by various entities that are now part of the University of Maryland Medical Systems Corporation. Hereinafter

Initially, Evander had secured insurance for the hospital from St. Paul Fire & Marine Insurance Company. In 1975, St. Paul decided to withdraw from the state's medical malpractice market, and Evander procured policies for the hospital from the Mutual Fire, Marine & Inland Insurance Company ("Mutual Fire"). Evander negotiated the Mutual Fire policies through Mutual Fire's general underwriting manager and agent, Shand, Morahan & Company, Inc. ("Shand"). Shand was a wholly-owned subsidiary of Alexander & Alexander, an insurance brokerage firm.

The Mutual Fire policies were "claims made" policies. Thus, a claim would be covered only if it were made within the policy period. Because of some unusual features of medical malpractice claims, such as the relative frequency of latent injury, the termination of a claims made policy left the insured exposed for many years to liability for events that had occurred within the policy period. This potential exposure concerned the hospital, as the hospitals financial planning was undermined by uncertainty about the number and extent of the malpractice claims which it might receive. Because of this concern, the initial Mutual Fire policies contained an Optional Extension Provision ("OEP") allowing the claims reporting period to be extended beyond the policy period in return for the payment of an additional premium. As rewritten in 1981, the OEP authorized the hospital to extend the claims reporting period indefinitely by making a single payment of 155% of the premium for the policies' final year. The OEP included the requirement that the hospital exercise the option, and pay the additional premium, within 30 days after terminating the policies. The OEP was included in each annual

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we shall refer to the named insureds collectively as the "hospital."

renewal of the policies.

Evander's relationship with the hospital continued amicably until 1984. In 1984 the hospital underwent an organizational change, becoming part of a corporate entity separate from the University of Maryland. One consequence of that change was the establishment of a committee, led by Dr. Susan S. Swift, to assess and review the hospital's insurance needs. The committee sent out "requests for proposals" to a number of insurance brokers, including Evander and Alexander & Alexander ("Alexander"). The requests for proposals asked detailed questions about the brokers' organizations and about their experience and ability in the field of professional liability insurance. After reviewing the proposals of the six brokers who responded, the committee, on behalf of the hospital, chose Alexander to succeed Evander as the hospital's broker.

On January 30, 1985, the hospital issued a "broker of record" letter, authorizing Alexander to represent its insurance interests. The letter allowed Alexander to negotiate on the hospital's behalf "as respects changes in existing insurance policies and in closing, changing, increasing or cancelling insurance. . . ." The letter specifically provided that it was "intended to include all policies presently placed with Mutual Fire through Shand, Morahan & Company."

Evander was disappointed by the hospital's decision. Mr. Evander wrote to Dr. Swift, telling her that "[h]aving initiated, developed and shepherded the current program through the past ten (10) years we feel, to be candid, as if there has been a death in the family without knowing the cause." Mr. Evander explained that he had continually modified the hospital's insurance program over the years, negotiating with Shand and Mutual Fire for concessions for his client. Under the circumstances, he wrote, it would be unfair for the hospital to appoint another broker if it

intended to renew the Mutual Fire policies because "to have [another broker] step into our shoes after establishing and developing the program, we trust you will agree is an unearned position."

Bob Liston, the Shand Vice President responsible for the hospital account, agreed with Evander. By February 1, 1985, Liston had learned that Alexander was ready to send Shand a broker of record letter from the hospital. On that date he wrote a memorandum to Joe Prochaska, Shand's Chairman, explaining that he had told Evander once, and Dr. Swift twice, that Shand would not accept a broker of record letter on the Mutual Fire policies from anyone except Evander. In support of his position, Mr. Liston noted Mr. Evander's many achievements for Shand: business worth over $39,000,000 which he had produced for Shand from Maryland, his careful attention to insurance legislation in Maryland, and his support of Shand through the implementation of sharp rate increases.

For its part, the hospital was concerned that it might lose its access to Mutual Fire. The hospital committee was reluctant to forego any options in the precarious liability insurance market, and Dr. Swift told Alexander that Alexander's continued representation of the hospital depended on an agreement from Shand that the hospital, through Alexander, could renew the existing Mutual Fire policies if the hospital chose to do so.

Joe Prochaska and Mac Calhoun, the Chairman and President of Shand, were asked to attend a meeting of top Alexander executives in Scottsdale, Arizona, in early February 1985. Prochaska and Calhoun met with the President of Alexander, Michael White. As a consequence of the meeting, White called Dr. Swift to tell her that Shand had no option but to accept the broker's letter from Alexander, and Shand did accept the letter.

At some time in early 1985, the hospital and Alexander entered into a brokerage contract. Alexander was appointed broker for the hospital for one year,[3] beginning July 1, 1985.[4] Alexander was to provide a full range of brokerage services, and the hospital was to pay a flat annual fee of $250,000, payable in monthly installments. The parties expressly noted the consequences of the flat fee arrangement, stating in their agreement that

> "[t]he fees are intended to replace the commissions associated with procuring insurance. Therefore, all insurance quotations should be obtained net of commission fees. If this is not possible a credit will be granted in an amount equal to the commission."

This provision obliged Alexander to give the hospital credit for any insurance payment by the hospital that represented commission, since Alexander would already have been paid an agreed price for its services.

After Alexander's appointment as broker, and before the July 1, 1985, date for termination of Evander's services, Evander continued to service the hospital account and to receive its commission on premiums paid by the hospital. Meanwhile, Alexander and the hospital were reviewing the range of available insurance options. Ultimately the hospital chose a system of self-insurance rather than renewal of the Mutual Fire policies. This decision was predicated on the exercise of the OEP option.

On May 6, 1985, Alexander told Shand that the hospital

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[3] The agreement provided each party with the option to withdraw on thirty days' notice to the other.

[4] The effective date of the Mutual Fire policies was July 1. Alexander and the hospital chose the anniversary and renewal date of the existing insurance coverage to begin their relationship.

would not renew the Mutual Fire policies when they expired at the end of June. Alexander also told Shand that the hospital intended to exercise the OEP option. Shand passed the news on to Evander. On May 8, 1985, Evander sent a letter to the hospital, explaining how the OEP option had to be exercised and calculating the premium for the exercise of the option. Evander also claimed a commission on the premium. The alleged prior understanding between Shand and Evander was that Evander would receive a commission of 8% of premiums on policies procured by Evander. Evander calculated the amount of the OEP premium to be over $3,000,000, and asked Shand for a commission of $265,907.28.

Evander's request for a commission on the OEP premium threatened to wipe out Alexander's entire fee from the hospital for the year beginning July 1, 1985. If Shand's bill to the hospital were to include a sum equal to Evander's commission, as the bill undoubtedly would if Shand paid Evander, then, under the terms of the fee agreement between Alexander and the hospital, Alexander would be obliged to credit the hospital with the amount of the commission. Alexander asked Shand to bill the hospital for the exercise of the option in an amount that did not include Evander's commission. Shand refused. Alexander's position was that the hospital owed no commission to anyone, since the exercise of the option was an insurance service covered by Alexander's flat fee. Shand insisted that it owed Evander a commission on the premium. Shand, however, ultimately complied with Alexander's request, and the hospital received and paid a bill for a sum which did not include an amount equal to the commission demanded by Evander. Consequently, Evander received no commission for the premium that the hospital paid to exercise its rights under the OEP provision.

Evander then brought the present action in the Circuit

Court for Baltimore City against Alexander, Shand, Mutual Fire and Mary Scheeler, an Alexander vice president and the executive responsible for the hospital account. Evander sought compensatory damages equal to the commission on the OEP and punitive damages. Evander's complaint contained fourteen counts. Only three were ultimately submitted to the jury: a breach of contract count against Shand and Mutual Fire, a count charging tortious interference with contract against Alexander, and Scheeler, and a tort count based on "civil conspiracy" against all four defendants. Evander sought only compensatory damages under the breach of contract count, but asked for both compensatory damages and $5,000,000.00 in punitive damages under each of the two tort counts.

At trial, in connection with its claim for a commission on the OEP, Evander introduced into evidence a document, "PX43," that allegedly contained the terms of a 1975 exclusive Producer's Agreement between Shand and Evander. The document, which had been sent by Shand to Evander in 1975, set out the proposed terms and conditions under which Evander was to produce medical malpractice insurance business for Shand. Evander had responded in 1975 by sending a letter to Shand explaining that PX43 did not reflect the agreement between the parties because it omitted both a ninety day notice provision for termination and an agreement that Evander's commission would remain unchanged for three years.[5] Evander's letter stated that it would sign PX43 promptly if its requested changes were made. Shand denied that there had ever been any agreement that Evander's commission would be fixed for a three year period.[6] Instead,

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[5] Evander's letter was admitted into evidence as PX44.

[6] Shand's letter was admitted into evidence as PX45.

Shand offered to "forward the necessary document" if Evander wished to execute a contract including the ninety day notice provision, but excluding the three year fixed commission. The record contains no evidence that Shand and Evander ultimately agreed on the terms of their relationship. Nonetheless, Evander took the position at the initial trial that the exclusive agreement described in PX43 gave it the sole right to receive a commission on the OEP.

Evander at the first trial also produced an expert witness in insurance matters, who testified that a party who produces an insurance policy is, according to custom and usage in the insurance industry, entitled to receive the commission on an OEP exercised when the policy is terminated. In addition, Mr. Evander testified to the course of his dealings with Shand and Mutual Fire over the years.

In connection with evidence of "malice," a component of both the tortious interference claim and the request for punitive damages, Mr. Evander was permitted, over objection, to testify to comments allegedly made by Mary Scheeler. Mr. Evander told the jury that a vice president of Shand had told him during a telephone conversation that Scheeler "hates your ass" and intended to drive him out of business. Similar testimony from Evander's former office manager was also admitted.

The jury found for Evander under the breach of contract count and further found that "the precise commissions that Evander lost" were $250,052.52 plus interest. The jury also found Alexander and Scheeler liable under both tort counts. The verdict sheet did not require the jury to assess separate compensatory damages on these counts; the parties had agreed that, if there was liability under the tort counts, the compensatory damages would be the same as under the contract count. The jury found that Alexander and Scheeler had tortiously interfered with a

contractual relationship between Evander and Shand, and had done so with actual malice. Furthermore, the jury found that "Alexander and Scheeler. . . entered into a conspiracy with Shand and Mutual Fire . . . to deprive Evander of commissions . . . ." The jury found all the defendants liable for punitive damages under the tort counts, although the verdict sheet did not allocate punitive damages between the two tort counts.[7] The jury assessed the amounts of punitive damages as follows: $40,000,000.00 against Alexander; $250,052.52 against Scheeler; and $70,104.15 against Shand and Mutual Fire.

The trial court reduced the amount of the punitive damages awarded against Alexander to $12,500,000.00. Alexander and Scheeler appealed, challenging both the determinations of liability and the awards of punitive damages. Alexander and Scheeler argued, *inter alia*, that there was no basis for a finding of actual malice. In this connection, they argued that evidence of Mary Scheeler's alleged statements had been improperly admitted. For reasons that do not appear in the record, Evander abandoned and released its claim for punitive damages against Shand and Mutual Fire before the case was argued in the Court of Special Appeals.[8]

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[7] In this connection, *see Caldor v. Bowden*, 330 Md. 632, 660-664, 625 A.2d 959, 972-974 (1993).

[8] Since Shand and Mutual Fire were parties to the alleged contractual arrangement for commissions, Shand and Mutual Fire could not be liable for tortiously interfering with that contractual arrangement. *See, e.g., Travelers Indemnity v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 89, *cert. denied*, 113 S.Ct. 465, 121 L.Ed.2d 373 (1992); *K & K Management v. Lee*, 316 Md. 137, 154-156, 557 A.2d 965, 973-974 (1989); *Sharrow v. State Farm Mutual*, 306 Md. 754, 763, 511 A.2d 492, 497 (1986). Consequently, the count charging interference with contractual relations was submitted to the jury only against Alexander and Scheeler. Awarding punitive damages for breach of contract is

The Court of Special Appeals upheld the award of compensatory damages under all three counts. With respect to punitive damages, however, the Court of Special Appeals vacated the awards and ordered a new trial. As the court explained, "[t]his was, at bottom, a commercial dispute between two

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"[c]ontrary to the settled policy of Maryland law," *K & K Management, supra*, 316 Md. at 169, 557 A.2d at 981. Therefore, the punitive damages against Shand and Mutual Fire must have rested on the "civil conspiracy" tort count.

In this connection, we note that "conspiracy" is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff. As Judge Alvey said for this Court in *Kimball v. Harman and Burch*, 34 Md. 407, 410-411 (1871), "an act which, if done by one alone, constitutes no ground of action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." Later, as Chief Judge, he further explained for the Court in *Robertson v. Parks*, 76 Md. 118t 135, 24 A. 411, 413 (1892):

> "[I]t is a general rule, that a conspiracy cannot be made the subject of a-civil action, unless something is done which, without the conspiracy, would give a right of action. The damage done is the gist of the action, not the conspiracy. When the mischief contemplated is accomplished, the conspiracy becomes important, as it may affect the means and measure of redress. The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it; and the fact of the conspiracy may aggravate the wrong; but the simple act of conspiracy does not furnish a substantive ground of action."

See also Green v. Wash. Sub. San. Comm'n, 259 Md. 206, 221, 269 A.2d 815, 824 (1970); *Rent-a-Car Co. v. Fire Ins. Co.*, 161 Md. 249, 260, 156 A. 847, 852 (1931); *Brinkley v. Platt*, 40 Md. 529, 536 (1874).

As pointed out above, a party to contractual relations cannot be liable for the interference tort based on those contractual relations. The tort is aimed at the person who interferes with the contract, and not at one of the contracting parties. We do not believe that this principle can be circumvented by the "conspiracy" device.

business competitors." *Alexander v. Evander*, 88 Md.App. 672, 719, 596 A.2d 687, 710 (1991). Reviewing the trial court's proceedings in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), a case decided after the judgment against Alexander had been rendered, the intermediate appellate court concluded that "[o]n this record, we do not believe that a $12.5 million punitive award comports with due process." *Alexander v. Evander*, *supra*, 88 Md.App. at 720, 596 A.2d at 710. The court remanded the case for a new trial, limited to "the issue of whether [the defendants'] conduct justifies an award of punitive damages and, if so, in what amount." 88 Md.App. at 722, 596 A.2d at 711-712.

The Court of Special Appeals' opinion was somewhat confusing with respect to the new trial. The court stated that the second jury should be instructed to assume as facts the specific findings listed on the first jury's verdict sheet, including the facts that Alexander and Scheeler tortiously interfered with a contract of Evander's, and that they did so with actual malice. 88 Md.App. at 722 and n. 14, 596 A.2d at 712 and n. 14. Nevertheless, the Court of Special Appeals also directed that the second jury should be given a definition of actual malice and told that actual malice is a requirement for an award of punitive damages. 88 Md.App. at 722, 596 A.2d at 712. The intermediate appellate court did not address Alexander's and Scheeler's contention that the trial court's instructions on actual malice had been inadequate.[9]

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[9] In fact, the jury at the first trial was never given an actual malice instruction with respect to Alexander and Scheeler. Actual malice was defined for the jury only in connection with a conspiracy instruction. Later, the jury was told that it could award punitive damages against Shand and Mutual Fire if it found that Shand and Mutual Fire had committed "tortious action in addition to a breach of contract." The instructions did not mention Alexander as a party

Both sides petitioned this Court for a writ of certiorari. In particular, Alexander and Scheeler in their petition argued that Evander had failed to establish its tortious interference claim because "at least three, and probably *all*" of the elements of the tort had not been proven. Evander, on the other hand, challenged the trial court"s grant of summary judgment in favor of the defendants on counts alleging fraud, fraudulent concealment, conversion and conspiracy to commit each of those torts. In light of the remand for a new trial on punitive damages, we denied both petitions. *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc.*, 323 Md. 1, 590 A.2d 158 (1991).

Prior to the new trial, Alexander paid Evander the compensatory damages award, with interest, on its own behalf and on behalf of Shand and Scheeler. By the time of the second trial, Evander had dismissed its claims for punitive damages against Shand and Mutual Fire. Alexander and Scheeler were the only remaining defendants, and tortious interference with contractual relations was the only legal theory for the recovery of punitive damages.

The punitive damages retrial lasted over three and a half weeks. Evander presented largely the same evidence which it had at the first trial, with the addition of evidence of Alexander's net worth.

At the second trial, Alexander challenged Evander's characterization of PX43 as a writing that formally embodied the

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to the conspiracy, and punitive damages were not mentioned in connection with the tortious interference instruction directed at Alexander and Scheeler. Alexander and Scheeler specifically objected at trial to the court's failure to give the actual malice instruction that they requested in connection with the tortious interference count, and they argued on appeal that the trial court had inadequately instructed the jury with respect to actual malice.

relationship between Evander and Shand. Alexander introduced evidence that Mr. Evander had testified at an unrelated trial that PX43 had never been executed or agreed to. Moreover, at the unrelated trial, Mr. Evander had claimed that, even if PX43 did reflect an informal agreement, it had been cancelled and terminated in October 1975. At the punitive damages retrial in this case, Alexander questioned Mr. Evander about this testimony, and Mr. Evander acknowledged that PX43 had been cancelled.

As previously discussed, at the first trial Mr. Evander had testified, over hearsay objections, to comments allegedly made by Mary Scheeler about her attitude towards Mr. Evander and his business. At the retrial, the court excluded this evidence on the ground that it was "inflammatory" and inadmissible hearsay.

At the conclusion of the second trial, the trial court, over the defendants' objection, instructed the jury as follows:

"You are to assume as fact the following:

> One, that Shand. . . and Mutual Fire . . . had a contract with the plaintiff that entitled the plaintiff to a commission on the [OEP];
>
> Two, that Shand and Mutual Fire breached or broke that contract with the plaintiff;
>
> Three, that the defendants, Alexander & Alexander, and Scheeler, tortiously interfered with the plaintiff's contract with Shand and Mutual Fire . . . . That this tortious interference by the defendants . . . was done with actual malice."

The court further instructed the jury that "actual malice is the performance of an act without legal justification or excuse but with evil or rancorous motive influenced by hate, spite or ill

will, the purpose being to deliberately and wilfully injure the plaintiff." The court told the jury that it could award punitive damages or not, as it saw fit, and explained that Evander had the burden of proving its entitlement to punitive damages by "a preponderance of the evidence."

The defendant made several objections to the court's instructions, including, *inter alia*, an objection to the instruction that Evander must prove its entitlement to punitive damages by a preponderance of the evidence, rather than by clear and convincing evidence.[10]

The second jury awarded punitive damages against Alexander in the amount of $4,000,000.00 and against Scheeler in the amount of $1,000,000.00.[11]

The defendants appealed to the Court of Special Appeals and Evander cross-appealed. Prior to any proceedings in the intermediate appellate court, both sides filed petitions for a writ - of certiorari which this Court granted, 331 Md. 284, 627 A-2d 1063 (1993). In this Court, the defendants argue, *inter alia*, that the evidence shows that no tort was ever committed,[12] that there was no evidence of actual malice, and that the punitive damages

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[10] After the Court of Special Appeals had reviewed the first trial but before the retrial on punitive damages had begun, we decided *Owens-Illinois v. Zenobia*, 325 Md. 420, 469, 601 A.2d 633, 657 (1992), which, *inter alia*, requires a plaintiff to establish entitlement to punitive damages by clear and convincing evidence.

[11] It had been made clear at trial that Alexander would pay any damages awarded against Scheeler.

[12] The primary ground for this argument is Alexander's and Scheeler's contention that PX43, the "contract" which formed the basis of Evander's tortious interference claim, never existed.

award should be set aside because it was not "rendered with meaningful standards." Evander complains about the exclusion from the second trial of evidence concerning the alleged statements attributed to Mary Scheeler.

II.

Punitive damages may be awarded only, *inter alia*, if there was tortious conduct accompanied by "malice." *Owens-Illinois v. Zenobia*, 325 Md. 420, 454-460, 601 A.2d 633, 650-653 (1992). Consequently, while the award of compensatory damages in favor of Evander is not directly before us, the question of whether there was tortious conduct in this case is obviously pertinent in deciding the allowability of punitive damages. Since "the availability of a punitive damages award ought to depend upon the heinous nature of the defendants tortious conduct," *Zenobia*, 325 Md. at 454, 601 A.2d at 649 (emphasis added), if no tort was committed there can be no basis for a punitive damages award. Moreover, in this particular case, Evander has relied on identical alleged facts to show both the presence of the tort and the actual malice required for the allowability of punitive damages. Under Evander's theory, Alexander's interference with the contractual relationship between Evander and Shand was wrongful, and accompanied by actual malice, because of the ill-will and spite towards Evander disclosed by statements allegedly made by Mary Scheeler.

Maryland recognizes the tort action for wrongful interference with contractual or business relationships in two general forms: "inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships . . ." *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 69, 485 A.2d 663, 674 (1984). We explained in the *Natural Design* opinion as follows (302 Md. at 69-70, 485 A.2d at 674):

> "The principle underlying both forms of the tort is the same: under certain circumstances, a party is liable if he interferes with and damages another in his business or occupation. The two types of actions differ in the limits on the right to interfere which will be recognized in either case. Thus, where a contract between two parties exists, the circumstances in which a third party has a right to interfere with the performance of that contract are more narrowly restricted. A broader right to interfere with economic relations exists where no contract or a contract terminable at will is involved. *See generally Goldman v. Building Assn.*, 150 Md. 677, 682, 133 A. 843 (1926); *Sumwalt Co. v. Knickerbocker*, 114 Md. 403, 414-4151 80 A. 48 (1911)."

See also Macklin v. Logan, 334 Md. 287, 297, 639 A.2d 112, 117 (1994); *K & K Management v. Lee*, 316 Md. 137, 154-155, 557 A.2d 965, 973 (1989); *Sharrow v. State Farm Mutual*, 306 Md. 754, 763, 511 A.2d 492, 497 (1986).

Earlier in this litigation, Evander appeared to argue that Alexander and Scheeler tortiously interfered with a specific, subsisting contract between Evander and Shand which gave Evander the exclusive right to a commission on the OEP premium. This contract was the one allegedly described in PX43. At the second trial and in the present appellate proceedings, however, Evander no longer contends that PX43 is the primary source of its right to a commission on the OEP premium. The Court of Special Appeals, after reviewing the record of the first trial, concluded that "Evander's right to a commission on the OEP . . . arose from an admixture of the 1975 producer's agreement with Shand and the 1975 policy procured by him from Shand/Mutual Fire, as renewed through June, 1985," and that the "producers agreement and the Mutual Fire policy were constituent parts of an overall business arrangement between Evander, on the

one hand, and Shand and Mutual Fire, on the other." 88 Md. App. at 687, 685-686, 596 A.2d at 694, 693. Evander's brief in this Court represents that Evander's "entitlement to a commission resulted from PX43 and Mr. Evander's understandings, his agreements and his practices with Shand over a 10-11 year period." (Evander's brief at 6). Counsel for Evander stated at oral argument before this Court that Evander's claim to the commission was not based on the alleged exclusivity agreement between itself and Shand, but on custom, usage and the overall course of dealings between the parties.

Consequently, this case does not involve an alleged wrongful interference with a specific, discrete contract between Evander and Shand but interference with an ongoing business relationship that included Evander's entitlement to a commission upon the hospitals exercise of the OEP option. This case thus implicates the broader form of the tort, namely malicious or wrongful interference with economic relationships.[13]

The elements of the broader form of the tort have remained unchanged in Maryland since this Court articulated them in *Willner v. Silverman*, 109 Md. 341, 355, 71 A. 962, 964 (1909) (quoting from *Walker v. Cronin*, 107 Mass. 555, 562 (1871)):

> "'(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and

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[13] Even if Evander were to rely primarily on the 1975 producer's agreement, PX43, the case would involve the broader form of the tort. By its terms, PX43 was terminable at will by either party. Interference with a contract terminable at will is analyzed as interference with economic relations broadly, and not interference with a specific contract. *Macklin v. Logan*, 334 Md. 287, 304-308, 639 A.2d 112, 120-122 (1994).

> loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.'"

See *K & K Management v. Lee*, *supra*, 316 Md. at 160, 557 A.2d at 973; *Natural Design, Inc. v. Rouse Co.*, *supra*, 302 Md. at 71, 485 A.2d at 675. Moreover, for punitive damages to be recoverable under either form of the tort, the wrongful interference with contract or economic relations must be accompanied by "actual malice," i.e., conduct by the defendant characterized by evil motive, intent to injure, ill will, or fraud. *See, e.g., Schaefer v. Miller*, 322 Md. 297, 317, 587 A.2d 491, 501 (1991) (concurring opinion); *Rite Aid Corp. v. Lake Shore Inv.*, 298 Md. 611, 626-627, 471 A.2d 735, 742-743 (1984); *Damazo v. Wahby*, 259 Md. 627, 638, 270 A.2d 814, 819 (1970); *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 569-570, 69 A. 405, 410 (1908).[14]

The malicious interference tort generally arises in a commercial setting. Participants in the economic marketplace are expected to act aggressively in seeking business and furthering

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[14] This Court's opinion in *Rite Aid Corp. v. Lake Shore Inv.*, *supra*, 298 Md. at 627, 471 A.2d at 743, quotes Chief Judge Hammond for the Court in *Damazo v. Wahby*, *supra*, 259 Md. at 638, 270 A.2d at 819, as follows:

> "'The Maryland rule is that malice in the sense of deliberate and improper violation of a known right, that is, absence of legal justification, will support an action and permit recovery of compensatory damages for deprivation of known contractual rights but that actual malice must be shown to support punitive damages.' *Id.* at 638 270 A. 2d 814."

their own position in the market.[15] "In the rough and tumble of the marketplace, competitors inevitably damage one another in the struggle for personal advantage." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 307 (Utah 1982). Courts and commentators have often found it difficult to determine when purposeful interference with business relationships, behavior that is an integral part of commercial competition, should be considered "wrongful" so as to give rise to a cause of action in tort.[16]

This Court has long recognized that self-interested commercial dealing has its proper place in the business world, Thus, in *Goldman v. Building Assn*, 150 Md. 677, 684, 133 A. 843, 846 (1926). the Court stated:

> "'Iron sharpeneth iron,' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest, and so involves the interference of the successful competitor

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[15] The law has long recognized business competition as deserving of protection. *See generally* Bruce Wyman, *Competition and the Law*, 15 Harv. L. Rev. 427 (1902) (discussing the historical progression of competition cases from the fifteenth century to the beginning of the twentieth); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 Yale L.J. 905, 36 Yale L.J. 42, 36 Yale L.J. 207, and 36 Yale L.J. 351 (1926) (describing aspects of the social history of England and America that affected the law of business competition from the early thirteenth century until 1925).

[16] The idea that a tort is a "wrong" is embodied in the notion of fault that lies at the heart of Maryland tort law. *See Nissen Corp v. Miller*, 323 Md. 613, 623, 594 A.2d 564, 569 (1991) ("[I]n adopting the cause of action for strict liability in tort, this Court has not abandoned the fundamental concept of fault.")

> with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort, unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong."

See also Macklin v. Logan, supra, 334 Md. at 302, 639 A.2d at 119; *Natural Design, Inc. v. Rouse, supra*, 302 Md. at 72-73, 485 A.2d at 676. Accordingly, we have made clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious. *Macklin v. Logan, supra*, 334 Md. at 304-305, 639 A.2d at 120-121; *Goldman v. Building Assn, supra*, 150 Md. at 684-686, 133 A. at 846; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218, 232, 64 A. 1029, 1031 (1906).

Moreover, this court has refused to adopt any theory of tortious interference with contract or with economic relations that "converts a breach of contract into an intentional tort."[17] *K & K Management, supra*, 316 Md. at 169, 557 A.2d at 981. The distinction between tort and contract actions in this context is significant. A successful plaintiff in a tortious interference case is not limited to the contract measure of damages, the benefit of the bargain, *Beard v. S/B Joint Venture*, 321 Md. 126,

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[17] Commentators note that the law should at least tolerate, if not favor, breach of contract "if B can breach a contract with A, pay damages to A, and still come out ahead. . . ." Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 Ark. L. Rev. 335, 360 (1980). See also Harvey S. Perlman, *Interference with Contract and other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 79-91 (1982); Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. Miami L. Rev. 487, 506-508 (1986).

133, 581 A.2d 1275, 1278 (1990), but can recover "the more extensive tort damages." *Rite Aid Corp. v. Lake Shore Inv., supra*, 298 Md. at 622, 471 A.2d at 740-741. Those damages "include the pecuniary loss of the benefits of the contract, consequential losses for which the tortious act is the legal cause, emotional distress and actual harm to reputation. . . .and, in appropriate circumstances, punitive damages." 298 Md. at 622, 471 A.2d at 740."[18]

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[18] In this connection, we note that in some other jurisdictions the distinction between breach of contract and tortious interference has been somewhat obscured. In 1969, Dean Prosser summarized numerous cases nationwide as holding that a person who "purposely interfered with somebody else's business" would be prima facie liable for the tort of malicious interference, and would bear "the burden of justifying his conduct by competition." 46 A.L.I. Proc. 196 (1969). This analysis was described as "reach[ing] the astounding result that the competitive order which we hold out to the world as a model is prima facie illegal." *Id.* at 201.

Even in our opinions, some language suggests that when a plaintiff relies upon interference with a specific contract, purposeful interference itself triggers liability. *See, e.g., Cumberland Glass Mnf'g Co. v. DeWitt*, 120 Md. 381, 394-395, 87 A. 927, 932 (1913), aff'd 237 U.S. 447, 35 S.Ct. 636, 59 L.Ed. 1042 (1915); *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 564, 69 A. 405, 408 (1908). On the other hand, we have on occasion specifically rejected this analysis. *See Travelers Indemnity v. Merling, supra*, 326 Md. at 343, 605 A.2d at 90 (deliberate interference could not provide basis for tort where it was not "wrongful or unlawful"); *Sharrow v. State Farm Mutual, supra*, 306 Md. at 764-765, 511 A.2d at 498 (intentional breach of an existing contract only tortious if "wrongful or improper").

Since this case concerns only the broader form of the tort, which unquestionably requires more than purposeful interference, we need not further explore this matter. Nevertheless, we note that legal scholars are generally critical of the broad scope of the malicious interference tort in many jurisdictions. *See, e.g.*, Francis Bowes Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663 (1923); Dan B. Dobbs, *Tortious interference with Contractual Relationships, supra*, 34 Ark. L. Rev. at 335; Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies, supra*, 49 U. Chi.

The tort of wrongful or malicious interference with economic relations requires intentional acts "'done with the unlawful purpose to cause. . . damage and loss [to the plaintiffs in their lawful business], without right or justifiable cause on the part of the defendants (which constitutes malice). . . '" *Willner v. Silverman*, *supra*, 109 Md. at 355, 71 A. at 964. In *Natural Design, Inc. v. Rouse Co.*, *supra*, 302 Md. at 71, 485 A.2d at 675, we reviewed our prior cases and noted that various factors might supply the element of malice under appropriate circumstances. *See, e.g., Willner v. Silverman*, *supra*, 109 Md. at 357, 71 A. at 964 (actual malice, such as ill will or spite); *McCarter v. Chamber of Commerce*, 126 Md. 131, 136, 94 A. 541, 542 (1915) ("'wrongful act done intentionally without just cause or excuse'"); *Goldman v. Building Assn.*, *supra*, 150 Md. at 682, 133 A. at 846 (unlawful acts). In *Natural Design*, the Court held that acts of interference committed in violation of a state antitrust statute constituted acts of wrongful or malicious interference.

In *K & K Management v. Lee*, *supra*, 316 Md. at 160-165, 557 A.2d at 975-979, we explained that an act of tortious interference with economic relations is characterized by the defendant's specific purpose to interfere, and that acts which incidentally affect another's business relationships are not a sufficient basis for the tort. In particular, the Court declined to hold that the tort would lie wherever an intentional breach of contract would foreseeably impinge upon a contracting party's economic relations with others. 316 Md. at 168-169, 557 A.2d at 980-981.

L. Rev. at 61; Donald C. Dowling, Jr., *Beyond the Unlawful Means Test*, *supra*, 40 U. Miami L. Rev. at 487.

The Court in *Travelers Indemnity v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 90, *cert. denied*, 113 S.Ct. 465, 121 L.Ed.2d 373 (1992), reiterated that "[f]or one to recover for tortious interference with contractual or economic relations, the interference must have been wrongful or unlawful." We held that an insurance company was not liable for the tort of wrongful or malicious interference when the alleged act of interference constituted the insurer's compliance with a state statute.

Most recently, we held in *Macklin v. Logan*, *supra*, 334 Md. at 301, 639 A.2d at 119, that malicious interference with economic relations requires "both a tortious intent and improper or wrongful conduct." In particular, the Court emphasized that tortious intent alone, defined as an intent "to harm the plaintiff or to benefit the defendant at the expense of the plaintiff" (*ibid.*), was not sufficient to turn deliberate interference into a tort, but that the defendant must interfere through improper or wrongful means. 334 Md. at 302, 639 A.2d at 119.

Therefore, wrongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and "'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *K & K Management v. Lee*, *supra*, 316 Md. at 166, 557 A.2d at 979, quoting Prosser, *Law of Torts*, Sec. 130, 952-953 (4th ed. 1971).

In addition, "actual malice," in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference. See *Willner v. Silverman*, *supra*, 109 Md. at 357, 71 A. at 964; *Leigh Furniture and Carpet Co. v.*

Isom, supra, 657 P.2d at 307; *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 843, 320 N.W.2d 759, 763 (1982); *Alyeska Pipeline Service v. Aurora Air Service*, 604 P.2d 1090, 1094 (Alaska 1979); *Kecko Piping, Inc. v. Town of Monroe*, 172 Conn. 197, 202, 374 A.2d 179, 182 (1977); *Heavener, Ogier Services v. R. W. Fla. Region*, 418 So.2d 1074, 1077 (Fla. App. 1982); Prosser, *Law of Torts*, 953 (4th ed. 1971); Restatement (Second) of Torts, Sec. 768, comment g (1977).

Evander has not argued that Alexander's acts of interference were malicious because they were illegal.[19] Neither has it claimed that Alexander's conduct was independently tortious. Evander has based its theory of tortious interference as well as its claim for punitive damages, on the existence of actual malice allegedly established by statements attributed to Mary Scheeler.

We note that under the circumstances of this case Evander carried a heavy burden in trying to establish the interference tort through proof of actual malice. As explained in *Macklin v. Logan, supra*, 334 Md. at 305-308, 639 A.2d at 121-122, under the broader form of the tort, acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent. Proof that

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[19] In connection with its civil conspiracy claim, Evander argued that Alexander's actions violated Maryland's anti-rebating statute, Maryland Code (1957, 1994 Repl. Vol.), Art. 48A, Sec. 226. Nevertheless, Evander has never argued that the statute is pertinent to establishing that the interference with Evander's contract or economic relations was tortious because it was unlawful. The Court of Special Appeals discussed the statute only in the context of the conspiracy claim. *Alexander v. Evander*, 88 Md. App. 672, 694-703, 596 A.2d 687, 697-702 (1991). The parties have not briefed or argued the issue in this Court. Therefore, we need not explore, in this case, the meaning and scope of the anti-rebating statute.

Alexander harbored animosity towards Evander when it interfered with Evander's economic relationship with Shand would not sustain the tort if Alexander's animosity was incidental to its pursuit of legitimate commercial goals.

It would appear that Alexander's acts were undertaken pursuant to legitimate commercial goals. Evander, however, suggests otherwise because Alexander influenced decisions at Shand while Shand was a wholly-owned subsidiary of Alexander. In Evander's view, the relationship between Alexander and Shand made Alexander's exercise of influence over Shand particularly objectionable. In fact, that relationship gave Alexander further legitimate reasons for acting as it did. A parent corporation is generally justified in requiring its subsidiary to modify economic arrangements, contractual or otherwise, if those arrangements do not benefit the parent. Under these circumstances, interference by the parent is ordinarily not tortious. *Green v. Interstate United Management Serv. Corp.* 748 F. 2d 827, 831 (3d Cir. 1984) (applying Pennsylvania law); *Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 702 F.2d 719, 722 (8th Cir. 1983) (applying Missouri law); *Bendix Corp. v. Adams*, 610 P.2d 24, 31-32 (Alaska 1980); *Culcal Stylco, Inc. v. Vornado, Inc.*, 26 Cal.App.3d 879, 882, 103 Cal. Rptr. 419, 421, (1972); *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687, 301 N.Y.S.2d 610, 613-614, 249 N.E.2d 459, 461 (1969); *Coniff v. Dodd, Mead & Co.*, 593 F.Supp. 266, 269 (S.D.N.Y. 1984); *James M. King & Assoc. v. G. D. Van Wagenen Co.*, 717 F. Supp 667, 681 (D. Minn. 1989); *City of Warrensburg, Mo. v. RCA Corp.*, 571 F.Supp. 743, 751 (W.D. Mo. 1983). See *United v. Potts & Callahan*, 231 Md. 552, 560, 191 A.2d 570, 574 (1963);

Restatement (Second) of Torts, Sec. 769.[20] *See also Juengel Const. Co., Inc. v. Mt. Etna, Inc.*, 622 S.W.2d 5100 516 (Mo. App. 1981) (affirming liability based on parent corporations "arbitrary and whimsical interference" with its subsidiary's contract, and where parent's pecuniary interest was not threatened).[21]

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[20] Section 769 of the Restatement provides that an entity or individual with a financial interest in another's business does not interfere improperly with that other's economic relationships if the interferer acts lawfully "to protect his interest from being prejudiced by the relation."

Comment e to the section states as follows:

> "The rule stated in this Section applies for the purpose of protecting the actor's interest. If his conduct is directed to that end, it is immaterial that he also takes a malicious delight in the harm caused by his action; if his conduct is not so directed and is designed solely for some other aim, such as the gratification of his ill will, he is not entitled to the protection of the rule in this Section."

[21] It is not clear under Maryland law whether the interference tort lies where the plaintiff's contract or economic relations are with a corporation, and the defendant in the interference action is a controlling officer or stockholder (including parent corporation) of the contracting corporation. Although some jurisdictions have found tortious conduct under these circumstances, they have generally limited tort liability to situations in which the controlling individual or entity acted in bad faith. *See generally* Thomas G. Fischer, *Liability of Corporate Director, Officer, or Employee for Tortious interference with Corporation's Contract with Another*, 72 A.L.R.4th 492 (1989, 1994 Supp.). Under Maryland law, it could be argued that the analytical framework for the tort, as set out in *K & K Management v. Lee*, *supra*, 316 Md. at 154-156, 557 A.2d at 973-974, and *Travelers Indemnity v. Merling*, *supra*, 326 Md. at 343, 605 A.2d at 89-90, does not exist where the entity that controls a corporation is sued for interfering with that corporation's contracts. *See Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1197 (5th Cir. 1985) ("the interests of [parent and subsidiary] are aligned so closely that we have difficulty even recognizing their separate identities for the purpose of this [tortious interference] analysis"). We do not reach this question in the present case.

The relationship between Alexander and Shand gave Alexander a direct financial stake in Shand's business relationships with other entities. Alexander was generally justified in directing Shand not to continue relationships that Alexander saw as detrimental to its own long-term financial interests. Provided that Alexander acted to protect these interests, it would not be liable in tort for interfering with Shand's economic relationships even if it harbored an incidental animosity towards Evander.

Even assuming, arguendo, that proof of ill will or spite could sustain the tort under these circumstances, Evander utterly failed to prove such ill will or spite. At the first trial, Mr. Evander was permitted to testify, over hearsay objections, to his recollection of a telephone conversation with Bob McDonald, Shand executive. During that conversation McDonald reportedly told Mr. Evander that Mary Scheeler had said that she was going to put Mr. Evander out of business and "that she hates your ass and she's going to get you." The record does not reveal to whom these statements were supposedly made.[22]

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[22] Interestingly, when Mr. Evander was asked at his deposition in 1988 whether or not he had any reason to suspect that Alexander had acted towards him with spite, he had answered "I only know of a remark that came to me second or third hand that Mary Scheeler was going to put me out of business." Pressed to identify the source of the remark, Dixon Evander repeatedly stated that he could not remember it. Nonetheless, at trial in 1990 Mr. Evander confidently traced the comments to the telephone call with McDonald, saying "I remember that conversation quite well."

In deposition testimony introduced as evidence at the first trial, Mr. McDonald denied having made any such remarks to Mr. Evander.

Similar testimony admitted at the first trial, but not at the second trial, was elicited from Edna Watterscheidt, Evander's former office manager. Ms. Watterscheidt was permitted to testify at the first trial, again over defense objections, that McDonald had told her "on numerable occasions" that Evander "got the shaft. We were screwed and we were f------." Questioned about what she meant by this testimony, Watterscheidt conceded that McDonald was describing in colorful terms his opinion of the fact that Evander would not get a commission on the OEP premium.

Mr. Evander's account of what McDonald allegedly told him that Mary Scheeler had said was hearsay within hearsay. Evander argues that this hearsay was improperly excluded at the second trail, Evander contends that it was admissible because it consisted of statements made by Mary Scheeler to her "co-conspirators."

Evander's argument is without merit. The record does not clearly show who was the recipient of Scheeler's alleged statements. Even if we assume that Scheeler made such comments to McDonald himself, there is no evidence that McDonald was involved in any kind of conspiracy to deprive Evander of a commission. On the contrary, Evander's own evidence showed that Shand's employees adamantly supported Evander until Alexander's president told Shand's two top executives that Shand must work with Alexander on Alexander's terms. There is no evidence that McDonald, who was not one of these top executives, ever took any position adverse to Evander's interests. Under the circumstances, there is no basis for Evander's claim that McDonald was a participant in a conspiracy against Evander. Accordingly, even if the hearsay exception for the statements of co-conspirators were otherwise applicable, it cannot

help Evander here. *See Daugherty v. Kessler*, 264 Md. 281, 291, 286 A.2d 95, 100 (1972).

Edna Watterscheidt's testimony does not refer to any statements allegedly made by Scheeler. Instead, Ms. Watterscheidt testified to what McDonald had told her about his opinion of the denial of commission to Evander. The co-conspirators exception to the hearsay rule simply does not apply to this testimony.[23]

Accordingly, we hold that the trial court correctly excluded all evidence of McDonald's alleged statements from the second trial. In light of the complete absence of other evidence of malice at the second trial, we can only conclude that the second jury reached its verdict because the court instructed it to find as a fact that Alexander and Scheeler had committed tortious interference with actual malice.[24]

Evander's evidence of actual malice at the first trial also consisted of the statements attributed to Mary Scheeler. We have held that the trial court at the first trial erred in admitting that

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[23] Indeed, Evander does not even attempt in its brief to apply the exception to the Watterscheidt testimony. Neither does it offer any alternative theory of admissibility for the evidence.

[24] Evander argues that it introduced further "malicious evidence" in the form of testimony that Scheeler "falsely accused [Mr. Evander] of improperly and unnecessarily collecting a state tax." (Evander's reply brief at 5). While it is true that Evander's trial counsel forcefully suggested to Ms. Scheeler that she had made such accusations, Scheeler repeatedly denied that she had done so. On the contrary, Scheeler explained that her investigation of taxes paid by the hospital in connection with the insurance policies was simply a part of her overall review of her new client's insurance transactions.

Evander has pointed to no testimony or other evidence that Scheeler made accusations against Evander, and we have found none in the record.

evidence. Thus, at both trials, Evander failed to offer sufficient admissible evidence of actual malice for this issue to have been submitted to either jury.

Evander failed to establish that the defendants' interference with economic relations was wrongful or malicious, and thus failed to prove the existence of tortious conduct. Moreover, even if we were to assume arguendo the existence of tortious conduct, Evander failed to establish the requisite actual malice to support an award of punitive damages.[25]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY UPON THE PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES AGAINST ALEXANDER & ALEXANDER AND MARY D. SCHEELER REVERSED, AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO ENTER JUDGMENTS ON THOSE CLAIMS IN FAVOR OF ALEXANDER & ALEXANDER AND MARY D. SCHEELER. PLAINTIFF TO PAY COSTS.

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[25] In light of our holding that there was no basis for any award of punitive damages, we need not in this case reach Alexander's alternative arguments that the punitive damages awards were disproportionate to Evander's injury and Alexander's culpability, and that the awards failed to satisfy due process requirements.